

**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

Katherine TRACEY,	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 3:99cv146 (PCD)
	:	
ST. PAUL FIRE & MARINE INS.	:	
CO., <i>et al.</i> ,	:	
Defendants.	:	

**RULING ON MOTIONS FOR SUMMARY JUDGMENT**

Defendants move for summary judgment on the complaint. Plaintiff responds with her motion for summary judgment on defendants' seventh affirmative defense. For the reasons set forth herein, defendants' motion for summary judgment is denied and plaintiff's motion for summary judgment is granted.

**I. JURISDICTION**

This court has subject matter jurisdiction over the present claims pursuant to 28 U.S.C. § 1332.

**II. BACKGROUND**

On December 7, 1996, plaintiff was injured in an automobile accident involving a second automobile driven by Rigoberto Sanchez. Sanchez's automobile was insured by USAA Insurance Co. ("USAA") with a policy limit of \$10,000. Plaintiff's automobile, owned by and operated with the consent of Margaret Staack, was insured by defendant United States Fidelity & Guaranty Insurance Co. ("USFG") with a underinsured motorist liability limit of \$500,000. Sanchez was employed by Telecommunications Cable Corporation ("TCC") as a cable

television installer. TCC maintained an business automobile insurance policy issued by American Motors Insurance Co. (“AMIC”) for all automobiles operated in furtherance of TCC’s business with a policy limit of \$1,000,000.

On January 26, 1999, Plaintiff filed a two-count complaint. The first count alleges that St. Paul Fire & Insurance Co. (“St. Paul”) was obligated to pay her \$500,000 for its underinsurance liability and has failed to do so. The second count alleges the same against USFG. On February 17, 1999, plaintiff was authorized by defendant St. Paul, which is liable for any policy issued by USFG, to sign a release of claim for Sanchez and USAA in exchange for a \$10,000 settlement.

### III. DISCUSSION

Defendant moves for summary judgment arguing that plaintiff is not entitled to the underinsured motorist coverage she seeks because Sanchez was not underinsured and because she failed to exhaust available liability coverage limits before seeking underinsured motorist benefits. Plaintiff responds that Sanchez was underinsured and that she has exhausted available liability coverage limits before claiming underinsured motorist benefits. Plaintiff moves for summary judgment on defendants’ affirmative defense alleging failure to exhaust available liability coverage.

#### **A. Standard of Review**

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202

(1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991). Determinations as to the weight to accord evidence or credibility assessments of witnesses are improper on a motion for summary judgment as such are within the sole province of the jury. *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996).

## **B. Analysis**

Defendants argue that plaintiff cannot establish that Sanchez was an ‘underinsured motorist’ because he was covered by TCC policy in excess of their underinsured motorist coverage and she is thus ineligible for underinsured motorist coverage. Plaintiff responds that she is entitled to underinsured motorist benefits because TCC’s insurance policy was unavailable to Sanchez.

Underinsured motor vehicle coverage is governed by CONN. GEN. STAT. § 38a-336. The application of CONN. GEN. STAT. § 38-336 entails a two-step inquiry. First, the tortfeasor’s vehicle must satisfy the definition of “underinsured vehicle.” *Covenant Ins. Co. v. Coon*, 220 Conn. 30, 33, 594 A.2d 977 (1991). CONN. GEN. STAT. § 38a-336(e) defines “underinsured motor vehicle” as

a motor vehicle with respect to which the sum of the limits of liability under all

bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the uninsured motorist portion of the policy against which claim is made.

A vehicle is underinsured when the total liability insurance coverage available to the claimant is less than the uninsured motorist coverage limits of the claimant's policy. *Covenant Ins. Co.*, 220 Conn. at 34. Plaintiff must exhaust all liability policies available to the underinsured automobile's operator and owner before pursuing underinsured motorist benefits. *See* CONN. AGENCIES REGS. § 38a-334-6(a);<sup>1</sup> *Ciarelli v. Commercial Union Ins. Cos.*, 234 Conn. 807, 811, 663 A.2d 377 (1995). This does not require plaintiff to exhaust all liability policies as to any other tortfeasor, *i.e.* TCC on a respondeat superior theory, before pursuing underinsured motorist coverage. *See Gen. Acc. Ins. Co. v. Wheeler*, 221 Conn. 206, 211, 603 A.2d 385 (1992).

The relevant question is not whether TCC had liability coverage available to it for claims arising from damage caused by Sanchez's vehicle, but rather whether Sanchez, as the owner and operator of the vehicle involved, had liability insurance available to him under the AMIC policy. *See Ciarelli*, 234 Conn. at 811. The AMIC policy provides that "[AMIC] will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The policy further provides that "[t]he following are 'insureds': . . . [a]nyone . . . while using with [TCC's] permission a covered 'auto' [TCC]

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<sup>1</sup> CONN. AGENCIES REGS. § 38a-334-6(a) provides in relevant part: "The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured or underinsured motor vehicle. This coverage shall insure the occupants of every motor vehicle to which the bodily injury liability coverage applies."

hire[s] or borrow[s] except . . . [TCC's] employee if the covered 'auto' is owned by that employee." It is undisputed that Sanchez, even if characterized as an employee, owned and operated the automobile. Sanchez thus is not an "insured" under the AMIC policy, thus rendering unavailable *to him* the AMIC policy liability coverage limits. It is irrelevant to a determination of plaintiff's entitlement to coverage under an underinsured motorist policy whether TCC, which neither owned nor operated the automobile involved in the accident, is protected against potential liability for the acts of its employee.<sup>2</sup> Defendants' motion for summary judgment is denied.

Plaintiff moves for summary judgment on defendant's seventh affirmative defense that she was required to exhaust available bodily injury liability policies covering the alleged tortfeasor. In light of the above discussion, plaintiff's motion for summary judgment is granted as to the seventh affirmative defense as she has exhausted all policies available to the tortfeasor.

#### IV. CONCLUSION

Defendants' motion for summary judgment (Doc. 33) is **denied**. Plaintiff's motion for summary judgment on defendant's seventh affirmative defense (Doc. 42) is **granted**.

SO ORDERED.

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<sup>2</sup> This is not to say defendants would be left without recourse against TCC as Sanchez's employer. CONN. AGENCIES REGS. § 38a-334-6(e) affords an insurer a procedure by which to recover judgments in favor of its insured against third parties. It provides: "the insurer may require the insured to hold in trust all rights against third parties or to exercise such rights after the insurer has paid any claim, provided that the insurer shall not acquire by assignment, prior to settlement or judgment, its insureds' right of action to recover for bodily injury from any third party." *Id.*

Dated at New Haven, Connecticut, March \_\_, 2002.

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Peter C. Dorsey  
United States District Judge